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OF CALIFORNIA,

vs.

UNITED STATES OF AMER

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JOHN T. FEY, Clerk

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ER TERM, 1956

No. 447

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Appellant

Appellee.

United States District Court
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ONAL STATEMENT.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1956

No.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

JURISDICTIONAL STATEMENT.

Appellant is fully aware of the desire of the Supreme Court that the jurisdictional statement required by Rules 13 and 15 be as brief as possible. Appellant believes, however, that this appeal involves numerous questions of unusual gravity and public interest, and that a comprehen-

sive statement is necessary to assist the court to an understanding of those problems and of the context in which they arise.

Appellant appeals from the final judgment of the United States District Court for the Northern District of California, Southern Division, entered on June 5, 1956, declaring a statute of the State of California to be invalid as contravening certain provisions of the Constitution of the United States, and granting a permanent injunction prohibiting any action under said statute. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Northern District of California, Southern Division, is reported in 141 F. Supp. 168. A copy of said opinion and of the findings of fact, conclusions of law and judgment entered by said Court are attached hereto as Appendix A.

JURISDICTION.

This suit was brought under 28 U.S.C., Sections 1331, 2201, 2281 and 2284, seeking an adjudication that Section 530 of the Public Utilities Code of the State of California is unconstitutional and void, and requesting injunctive relief restraining the Public Utilities Commission of the State of California from taking any action under said

statute. The Judgment of the District Court was dated and entered on June 5, 1956, and Notice of Appeal was filed in that Court on July 31, 1956. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C., Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Radio Corp. of America v. U. S.* (1950), 341 U.S. 412; *Public Utilities Comm. of Calif. v. United Air Lines, Inc.* (1953), 346 U.S. 402.

STATUTES INVOLVED.

This appeal involves the validity of California Statutes of 1955, Vol. 2, p. 3608, Chapter 1966 (California Public Utilities Code, Section 530, as amended) which is as follows:

> "Every common carrier subject to the provisions of this part may transport, free or at reduced rates:
>
> "(a) Persons ~~or property~~ for the United States, state, county, or municipal governments; or *persons or property* for charitable or patriotic purposes, or to provide relief in cases of general epidemic, pestilence, or calamity.
>
> "(b) Property to or from fairs or expositions for exhibit thereat.
>
> "(c) Contractors and their employees, material or supplies for use or engaged in carrying out their contracts with such carriers, for construction, operation, or maintenance work or work incidental thereto on the line of the issuing carrier, to the extent only that such free or reduced rate transportation is pro-

vided for in the specifications upon which the contract is based and in the contract itself.

"Common carriers may also enter into contracts with telegraph and telephone corporations for an exchange of service.

"*The commission may permit common carriers to transport property at reduced rates for the United States, state, county, or municipal governments, to such extent and subject to such conditions as it may consider just and reasonable. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments at reduced rates no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permitted carriers as defined in the Highway Carriers' Act.*"*

This appeal also involves the following portions of the Constitution of the United States (attached hereto as Appendix B): Article I, Section 8, Clause 3 (Interstate Commerce), Clause 12 (Support Armies), Clause 13 (Maintain Navy), Clause 16 (Militia), Clause 17 (Forts, etc.), Clause 18 (Make Laws to Execute Powers); Article IV, Section 3, Clause 2 (Rules re Property of United States); Article VI, Clause 2 (Supreme Law of Land); Amendment XIV, Section 1 (Due Process).

Also involved are the following Federal statutes (pertinent portions of which are attached hereto as Appendix C): 28 U.S.C., Section 1342 (62 Stat. 932) (Johnson Act); 28 U.S.C., Section 2201 (68 Stat. 890) (Declaratory

*The words shown above as stricken were deleted, and those shown in italics were added, by the 1955 amendment.

Relief); 49 U.S.C., Section 22 (58 Stat. 751) (Interstate Commerce Act); 41 U.S.C., Section 151 (62 Stat. 21) (Armed Services Procurement Act of 1947, as amended); 40 U.S.C., Sections 471 (68 Stat. 1126), and 481(a)(4) (64 Stat. 591) (Federal Property and Administrative Services Act of 1949, as amended).

QUESTIONS PRESENTED.

A. Preliminary or Threshold Question.

Did the District Court have jurisdiction to entertain the complaint?

(1) Did the complaint allege or describe an actual controversy within the meaning of 28 U.S.C. Sec. 2201?

(2) Did the Plaintiff (Appellee) fail to exhaust the administrative remedy available to it in a proceeding before the Public Utilities Commission of the State of California?

(3) Did the complaint involve a matter which is within the primary jurisdiction of the Public Utilities Commission as an administrative agency of the State of California?

(4) Was the District Court prohibited by the Johnson Act (28 U.S.C. Sec. 1342) from granting the relief requested by the Plaintiff (Appellee)?

(5) Did the complaint allege facts showing irreparable injury to the Plaintiff (Appellee) in the absence of injunctive relief?

(6) Did the Plaintiff (Appellee) have an adequate remedy elsewhere than in the District Court?

(7) Was the District Court required by law to abstain from granting the relief requested by the complaint in order to preserve comity in the relationship between the Government of the United States and that of the State of California?

B. Evidentiary Questions.

(1) Did the District Court err in overruling Defendant's (Appellant's) objections to questions calling for expressions of opinions by Plaintiff's (Appellee's) witnesses upon the ultimate issues in the case?

(2) Did the Plaintiff (Appellee) prove at the trial, by a preponderance of the evidence, that it would suffer irreparable injury in the absence of injunctive relief?

C. Ultimate Question.

Does the State of California have the lawful power to regulate the intrastate rates of carriers for the transportation of property of the United States between points in the State of California, and do the action and judgment of the District Court violate the Tenth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Appellant (hereinafter referred to as the "Commission") is a body duly constituted, and has its jurisdiction prescribed, by the Constitution and statutes of the State of California, for the purpose, among others, of regulating the intrastate rates of commercial carriers for transportation of property between points in the State of California.

In 1954, and for many years prior thereto, those common carriers in California which filed their own tariffs and were regulated as public utilities, had a right to transport property of the United States free or at reduced rates. This right was expressed in Section 530 of the Public Utilities Code of the State of California, prior to its amendment.

In June of 1954, a formal petition was filed with the Commission by a group of motor vehicle carriers alleging in substance that the United States Government is the largest single shipper of commodities moving between points in the State of California; that carriers transporting property of the United States between such points were assessing therefor unreasonably low and depressed rates; and that such practices were creating chaotic transportation conditions in the movement of such goods, were having a depressing influence upon the revenues of carriers, and, if continued, would result in creating a burden on other traffic. The petition requested that the matter be set for public hearing and that the Commission take appropriate steps to grant relief.

A number of hearings were had upon this petition at which an appearance was entered by counsel "for the

Armed Forces, Bureau of Supplies and Accounts, Code HA-1, Navy Department, Washington, D.C."

On June 25, 1955, the Commission issued a decision (No. 51047, attached hereto as Appendix D) in which it found in substance that the allegations of the petition were true. In its decision the Commission granted certain relief that was necessarily contingent upon cooperation by the United States Government in requiring carriers to file with the Commission special rate quotations offered for United States Government traffic before they became effective. Thereafter the Commission was informed by the petitioning carriers that such cooperation had been refused.

In July, 1955, the Legislature of the State of California amended said Section 530 of the Public Utilities Code. This amendment withdrew from common carriers the unlimited right to transport property of the United States Government free or at reduced rates and empowered the Commission to permit such reduced rates to such extent and subject to such conditions as it considers reasonable.

This statute was to become effective on September 7, 1955. It would affect, however, only those common carriers who filed their own tariffs and were regulated as public utilities. On August 16, 1955, therefore, the Commission issued a decision cancelling a certain provision in one of the minimum rate tariffs previously established by it for application to the transportation of general commodities, in order to revoke the right of carriers bound by that tariff to deviate from such minimum rate tariff for the transportation of property of the Armed Forces of the United States. (Decision No. 51832, at-

tached hereto as Appendix E.) This decision, by its terms, was to become effective on September 7, 1955, contemporaneously with the amendment to Section 530 of the Public Utilities Code.

On August 25, 1955, a public hearing was held for the purpose of reconsidering the matters raised by the carriers' petition above referred to. At this hearing an appearance was entered by an attorney as "Commerce Counsel, Bureau of Supplies and Accounts, Department of the Navy, for the Department of Defense and the Executive Agencies of the United States Government." At the conclusion of said hearing the matter was taken under submission subject to the filing on August 26, 1955, of a written request on behalf of the Department of Defense to postpone the effective date of said Decision No. 51832.

On August 26, 1955, the Department of Defense of the United States Government, pursuant to the right reserved to it, filed with the Commission a petition in substance acquiescing in Commission regulation of rates for the transportation of its property, and merely requesting a postponement thereof for 90 days or until new rates acceptable to the Commission could be negotiated.

On September 6, 1955, the Commission issued a new decision in which it ordered that the cancellation of the right to deviate from the minimum rate tariff above referred to was "hereby" made "effective December 5, 1955." (Decision No. 51922 attached hereto as Appendix F.) The opinion states that the cancellation of this right was postponed "in order to give the carriers and their tariff publishing agents reasonable opportunity to negotiate rate tenders mutually satisfactory to themselves and

to the Department of Defense and, where necessary, to seek authority from this Commission to establish such rate tenders as their lawful rates pursuant to Section 530 of the Public Utilities Code, as amended."

By a petition filed November 21, 1955, the United States Department of Defense sought a further 60-day postponement.

On November 29, 1955, the Commission denied this petition, giving its reasons therefor (Decision No. 52287, attached hereto as Appendix G).

As a result the withdrawal of the privilege of carriers to transport property of the United States Government free or at reduced rates was to become effective at 12:01 A.M. on December 5, 1955, which was a Monday. In the afternoon of the preceding Friday, December 2, 1955, the United States filed in the United States District Court for the Northern District of California, Southern Division, a complaint against the "Public Utilities Commission of the State of California" as the sole defendant, requesting that said Section 530 of the Public Utilities Code be declared unconstitutional and void insofar as it prohibits carriers from transporting property of the United States at rates other than those approved by the Commission, and requesting injunctive relief. *There was nothing whatever in the complaint alleging that the Commission had done anything, or that it was about to do anything, or that it had threatened to do anything, adverse to the plaintiff; nor was there a single word about the prior proceedings before the Commission or about the Commission's order of September 6, 1955.*

The injunctive relief requested in the complaint was entirely prohibitory in form, the request being merely that the Commission be prevented, restrained, enjoined and prohibited *from* doing certain things.

Upon filing the complaint, counsel for the Government applied to the District Court for a temporary restraining order, and orally informed the District Court that the Commission had previously taken affirmative action to implement Section 530 of the Public Utilities Code, and that that action was scheduled to become effective at 12:01 A.M. on Monday, December 5, 1955.

The Commission was given an opportunity to be heard upon the question of whether or not a restraining order should issue. The proposed restraining order was also merely prohibitory in form, and counsel for the Commission pointed out to the District Court that the Commission's action would become effective merely by the lapse of time and complete inaction by the Commission; that in order to prevent that result, the Commission would have to take affirmative action to convene and sign a new order countermanding its previous order prior to 12:01 A.M. the following Monday, which would be difficult to accomplish; that the carrier industry and the Government had had 90 days within which to prepare for the effectiveness of the order which the Commission had already entered; and that notice of the countermanding of the Commission's order would have to be given to thousands of carriers in the industry.

Nevertheless, the District Court issued the proposed restraining order, and stated orally that it construed the

order to require the Commission to take affirmative action to abate the effectiveness of the action previously taken by the Commission.

Summary of Complaint.

The 9-page complaint alleged in substance that the United States has established numerous civil and military installations in the State of California that some of these installations are situated on land ceded by the State of California to the United States and are under the exclusive jurisdiction of the United States; that property of the United States moving in intrastate commerce is commingled in the depot system maintained by the United States with property moving in interstate and foreign commerce; that it has been the practice of the United States to negotiate special rates with common carriers for the transportation of its property; that for many years the State of California exempted transportation of property of the United States from the provisions of California law pertaining to the filing of tariffs or approval of rates; that in July, 1955, the Legislature of the State of California amended Section 530 of the Public Utilities Code and deleted therefrom said exemption; that the application of the amended statute would disrupt the established practice of the United States, cause delays in shipments of its property, might jeopardize the security of the United States, and increase the administrative expense of the United States by requiring its officers and officials "to disentangle certain commodities from the mass of commodities in the current of commerce to determine whether or not particular shipments were in fact intrastate"; that such shipments would be "thrown into

the class rate, which as applied to such shipments, is recognized as unrealistically high": that the commodities involved in such shipments are not in competition with those of commercial shippers; that United States transportation officers might find it more economical to ship interstate and that California carriers might be precluded from participating in such traffic; and that the United States might have to relocate its depot system and might thereby cause loss of employment to citizens of California.

For these reasons the complaint alleged that Section 530 of the Public Utilities Code "and related sections" (unspecified) were unconstitutional and void under Article VI, Section 2 of the Constitution of the United States insofar as said sections prohibit carriers within the State of California from transporting property of the United States at rates different from those approved by the Commission in that said sections place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; place an unreasonable burden on interstate commerce; contravene the policy of the Congress implicit in the Federal Property and Administrative Services Act of 1949; and that the penalties provided in said Public Utilities Code are vague and uncertain and repugnant to Amendment XIV of the Constitution of the United States.

The complaint further alleged that the enforcement of said Section 530 of the Public Utilities Code would cause immediate and irreparable injury to the United

States in that the long established practice of the United States in negotiating special rates would "be completely disrupted and there will be attendant confusion, delay and expense arising from the effort to construct a new rate structure which would meet the approval of the Commission"; the necessity of having rates approved by the Commission "would entail added clerical and administrative work, which would not only be a burdensome interference to the United States in the discharge of its constitutional responsibility, but would likewise add an additional expense"; that "with the disruption of the existing rate structure by the application of the section, undoubtedly many particular shipments would be thrown into the class rate structure. Accordingly, the cost of transporting the property for the United States would be immeasureably increased"; that in the event it should be determined that the State of California had no authority to regulate rates for the transportation of property of the United States, the United States could not be compensated by bond or otherwise for the increased expense which would have resulted to it during the period in which the statute was in force; and that enforcement of Section 530 of the Public Utilities Code might jeopardize the national security.

The complaint requested that a three-judge Court be convened pursuant to Section 2284(1) of Title 28 of the United States Code; that the District Court grant a temporary restraining order and an interlocutory injunction to prevent and prohibit the Commission from enforcing or attempting to enforce said sections of the Public Utilities Code until the complaint was finally heard and

determined; that upon final hearing judgment be entered declaring that insofar as Section 530 of the Public Utilities Code of the State of California and related provisions (unspecified) prohibit carriers within the State from transporting property of the United States at rates other than those approved by the Commission, they are unconstitutional and void, and that the Commission "be permanently enjoined from making any effort to prohibit the carriers within the State from negotiationg and making arrangements and contracts for the carriage of property of the United States at rates and charges other than those determined by such contracts and arrangements between the United States and the carriers." [sic]

Proceedings in the District Court.

The Commission filed in the District Court a motion to dismiss the complaint on the grounds that the District Court had no jurisdiction over the subject matter of the complaint, and that the compliant failed to state a claim upon which relief could be granted. The questions raised by this motion were comprehensively briefed and argued before the District Court. The motion was denied. Thereafter the Commission filed its answer and the case was set for trial on the merits. The trial that followed continued for a week. Twelve witnesses were called by the Government. Virtually all of their testimony was concerned with military traffic of the Armed Forces of the United States. Nine of the witnesses called by the Government were military officers of the Armed Forces, having duties with respect to the procurement of transportation for Government property, and their civilian

assistants. Two other Government witnesses were repr sentatives of railroads. Over objection by counsel for t Commission, these witnesses were allowed to express the opinion that regulation of rates by the Commission woul impede and interfere with the transportation of propert of the United States. As reasons for their conclusio they said in substance that regulation would result i increased cost to the United States; that it would caus delays in shipments of property of the United States that it would impair the military security of the Unite States; that it would be difficult to distinguish betwee interstate and intrastate traffic; that the present syste of procuring transportation for Government property is good system, although attended by certain abuses tha result in depressed rates; and that the very existenc of state power would be onerous.

One of the witnesses called by the Commission was it Director of Transportation. He testified in substance tha he recognized in Section 530 of the Public Utilities Cod a legislative policy to give the United States Governmen preferential treatment; that he would so advise the Com mission; that he saw no reason why special commodity rates could not be established for the United States upo a proper showing; that it could be done expeditiously an without a public hearing; that he saw no reason why regulation of rates by the Commission would cause delay in the movement of military traffic; that the Commissio could authorize rates for Government traffic to be mad effective retroactively, that is, after moves had take place; and that with respect to traffic involving military

security, he would recommend a general order exempting such traffic from regulation.

The Commission's Chief Counsel stipulated on the record that he would officially advise the Commission that it has lawful authority under California law to authorize any carrier to negotiate with the United States with complete freedom concerning the transportation of any property of the United States which may involve security matters if a responsible federal official certified that such transportation involved security; and that the Commission has authority to authorize special rates under Section 530 of the Public Utilities Code without a public hearing and to make such authority effective immediately.

The matter was orally argued on April 19, 1956. Eleven days later, on April 30, 1956, the District Court handed down a 40-page memorandum decision in favor of the Government, wherein the District Court stated its reasons for its ultimate decision as well as for its denial of the Commission's motion to dismiss the complaint. The Government's counsel was directed to prepare proposed findings of fact, conclusions of law, and a form of judgment.

Summary of Findings by District Court.

Fifteen pages of findings were so proposed and adopted by the District Court. In substance, they were that there is a large volume of military traffic in California; that this traffic is different from commercial traffic; that some of it moves from and to installations situated on land ceded by the State of California to the United States; that rate regulation by the Commission would increase

the cost of transportation to the Government, would require additional personnel, and would cause delays in the shipment of Government property; that due to the flow of military materiel through the Government's depot system "it would be difficult to determine whether particular items shipped from one installation in California to another installation in California were in fact intrastate or interstate in character"; that it would be necessary to segregate materiel within the various depots and in trucks and rail cars in accordance with its origin or destination, resulting in "delays, increased man hours of work on the part of military personnel, friction and possible litigation"; that regulation of rates by the Commission would jeopardize the security of the United States; that the United States might have to relocate its depot system; that its officers would choose interstate rather than intrastate routes for its traffic to the prejudice of carriers in California; that the foregoing objections to regulation would be multiplied in case of war; that officers of the United States would be subject to criminal prosecution for violations of the Public Utilities Code or regulations of the Commission; and that "the transportation industry in California is in a healthy economic condition."

Conclusions of Law of the District Court.

The conclusions of law proposed by counsel for the Government and adopted by the District Court were in substance that it had jurisdiction over the cause and the parties thereto; that the complaint stated a claim upon which relief could be granted; that the complaint described an actual controversy within the meaning of 28

U.S.C., Section 2201; that "for no valid reason within the police powers or other reserve powers of the State of California, the application of Section 530 of the Public Utilities Code of California, as amended, will seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense," and that regulation of rates for the shipment of military materiel would be unconstitutional and void in the absence of any act of Congress; that by Section 22 of the Interstate Commerce Act, 24 Stat. 387 (49 U.S.C. 22); the Armed Services Procurement Act, 41 U.S.C. 151(c) [62 Stat. 21-26], and the Federal Property and Administrative Services Act of 1949, 63 Stat. 377, Sections 201 and 202 [40 U.S.C. 471, 481, 483], Congress has expressed a general policy that the procurement of transportation services for the shipment of Government property be free of regulation; that *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, is inapplicable to this case for the reasons that under the regulation involved in the *Penn Dairies* case there would be no direct interference with the officers of the United States in the discharge of their responsibilities, no delays or increased administrative burden or revelation of secret matter in the procurement of the items of supply there involved, and that the regulation of the price of milk by a State is related to the health of the population of the State; that the stipulation of counsel for the Commission that regulation by the Commission will not require the furnishing of secret information and that such regulation will involve a minimum burden on the United States, though made in utmost

good faith, was irrelevant; that insofar as Section 530 of the Public Utilities Code of the State of California purports to authorize the Commission to impose "such conditions as it may consider just and reasonable" upon the granting of reduced rates by commercial carriers for the transportation of property of the United States, it is invalid, void and of no effect as contravening the provisions of Article I, Section 8, Clauses 11, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2 of the Constitution of the United States; and that if said Section 530 should be applied to the United States, it would suffer irreparable injury, and had no adequate remedy at law.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal involves the preliminary question whether the District Court should have entertained the action and granted injunctive and declaratory relief, and the ultimate question of whether or not the State of California, or any other State, can lawfully regulate the intrastate rates of carriers transporting property of the United States between points in the State. The fundamental constitutional question of the relationship between State and Federal Governments and their respective constitutional powers is involved in both the preliminary and the ultimate questions.

The question of whether a State can lawfully regulate the intrastate rates of carriers for the transportation of property of the United States is one affecting all the 48 States. This question is presently being litigated in the Supreme Court of the State of Texas and in the United States Court of Claims where the laws and regulations

of the State of Kentucky are involved. There are indications that the question has become acute in Georgia, Michigan, Florida and North Carolina.

The provision of the Interstate Commerce Act, viz., Section 22 (49 U.S.C., Sec. 22), which is comparable to Section 530 of the California Public Utilities Code prior to its amendment, and which permits carriers to transport property of the United States in interstate commerce free or at reduced rates, has been the object of sharp criticism in a report, dated December 22, 1955, of the Interstate Commerce Commission to the Interstate and Foreign Commerce Committees of both the Senate and the House of Representatives; in "A Report to the President Prepared by the Presidential Advisory Committee on Transport Policy and Organization" (The Weeks Committee) in April 1955; in "A Report to the Congress by the Commission on Organization of the Executive Branch of the Government" (The Hoover Commission) in March 1955; and in a "Report on Transportation Prepared for the Commission on Organization of the Executive Branch of the Government by the Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense" in March 1955. These reports refer to the abuses and evils arising out of the transportation of property of the United States free or at reduced rates pursuant to said Section 22 of the Interstate Commerce Act, and to the widespread dissatisfaction therewith.

After extensive hearings before the Subcommittee on Transportation and Communications, the House Committee on Interstate and Foreign Commerce, on July 3, 1956,

approved the so-called Hinshaw Bill (H.R. 525) which would have amended said Section 22 of the Interstate Commerce Act in such a way as to revoke the privilege of carriers to transport property of the United States in interstate commerce free or at reduced rates.

The Senate had before it S. 1920 which, among other things, would have amended said Section 22 in such a way as to impose certain regulatory restrictions upon the privilege of transporting property of the United States free or at reduced rates.

Both of these bills died with adjournment of the 84th Congress. The controversy surrounding said Section 22 however, is still very much alive, and may well be brought up again before the next Congress.

It would be incongruous if said Section 22 should be amended by the next Congress in such a way as to correct the evils and abuses surrounding interstate transportation of property of the United States, while California and other States were rendered powerless to correct the same kind of evils and abuses in the transportation of such property in intrastate commerce.

The determination of the issues presented by this appeal will materially affect the pecuniary interests of the United States and of all the States which regulate intrastate transportation rates. The District Court found that for the fiscal year 1954-1955, $500,000,000 was expended by the Department of Defense for the transportation of materiel, of which approximately $20,000,000 was expended for the movement of property between points in California.

1. The District Court Should Not Have Entertained the Action

Before the complaint was filed the Department of Defense had been a party to an extended proceeding before the Commission involving the question of regulation of rates for the transportation of property of the United States. *The Department of Defense acquiesced in the Commission's jurisdiction over such rates, and invoked that jurisdiction in its own behalf*, by requesting and obtaining a postponement of a change in the rates applicable to it. The Department of Defense elected not to challenge or seek judicial review of the Commission's action. The United States then changed its mind and sought the aid of a Federal Court. In its complaint nothing whatever was said about the prior proceeding before the Commission or the rate order issued therein, nor was it alleged that the Commission had done, or was about to do, or had threatened to do anything whatever, adverse to the United States. The District Court therefore was wrong when it ruled that the complaint described an actual controversy between the parties to the action. This ruling conflicts with the cases of *Public Service Commission of Utah v. Wycoff Co.* (1952), 344 U.S. 237, and *Public Utilities Commission of California v. United Air Lines, Inc.* (1953), 346 U.S. 402.

The fact is, moreover, that the Commission *had* taken prior action, *and the District Court took cognizance of it by ordering the Commission to countermand it*, which was done. And an administrative remedy for reviewing the Commission's prior action was available to the United States, a remedy by means of which it could have raised

and obtained an ultimate determination of the very same questions it raised in the District Court. The United States failed to exhaust this remedy. It thereafter had no right to relief in a Federal Court. The United States, like anyone else, should be required to exhaust any administrative remedy that may have accrued to it by virtue of its having been a party to a proceeding before an administrative tribunal.

In disposing of this ground for dismissing the complaint, the District Court in its opinion said: "In the instant suit, the plaintiff does not question the propriety of an act of the defendant . . ." *No mention whatever is made in the District Court's findings of fact or conclusions of law, of the prior action of the Commission, or of the fact that the United States obtained a temporary restraining order by questioning the propriety of that action, all of which was in evidence before that Court.* In distinguishing the cases cited by the Commission in support of its argument that the United States had failed to exhaust its administrative remedy, the District Court said "not one [of such cases] dealt with the constitutionality of a State statute." The cases referred to are *Alabama Public Service Comm. v. Southern R. Co.* (1950), 341 U.S. 341; *Myers v. Bethlehem Shipbuilding Corp.* (1937), 303 U.S. 41; *Federal Power Comm. v. Arkansas Power & Light Co.* (1947), 330 U.S. 802, 803; *McCauley v. Waterman S.S. Corp.* (1946), 327 U.S. 540, 543-545; *Endicott Johnson Corp. v. Perkins* (1942), 317 U.S. 501, 507-510; *Rochester Telephone Corp. v. United States* (1939), 307 U.S. 125, 130. The reason given by the District Court does not make these cases inapplicable.

As one of the grounds for its motion to dismiss the complaint, the Commission argued that the Johnson Act (28 U.S.C., Section 1342, Appendix C, p. 1) prohibited the District Court from granting the relief requested by the United States. In its opinion (Appendix A, p. 44), the District Court professes to be "somewhat surprised that learned counsel seriously urges this point, in view of the fact that" the Johnson Act is applicable only in cases where an *order* has been issued by a state agency or other rate-making body. The District Court then disposes of the Commission's argument by stating that "in the instant case, the jurisdiction of this Court is based principally upon the unconstitutionality of a *statute* and not an '*order* . . . made by a state administrative agency or a rate-making body'." (Emphasis by District Court.) Again, the District Court closed its eyes to the fact that a rate order had been issued by the Commission on September 6, 1955, and that all the other requirements of the Johnson Act were fulfilled.

The Commission is not merely surprised, it is deeply disturbed that the United States and the District Court took cognizance of the Commission's order for the purpose of compelling the Commission to countermand it, and then ignored it as a basis for the application of the Johnson Act and of the principle that administrative remedies must be exhausted.

In disposing of the question of whether injunctive relief should be denied, as urged in the Commission's motion to dismiss, the District Court, in its opinion (Appendix A, p. 45), referred to the allegations of the complaint and said "for the purposes of the motion to dismiss, they must

be taken as true." It then said "the single allegation that the enforcement of Section 530 'would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement,' etc., of itself spells out one ground for equitable intervention. We are here dealing not chiefly with considerations of the market place, but with the plea of a constitutional sovereign to be permitted to discharge, without state interference, its duties in connection with its greatest task—the defense of the nation itself."

The quoted allegation, like most of the others in the complaint, is conjectural, vague, and lacking in particularity, and the District Court was wrong in saying that such allegations "must be taken as true." Only facts that are well pleaded are admitted by a motion to dismiss.

The fact is that the United States would not have suffered any injury whatever if injunctive relief had not been granted. In the first place, had it elected to do so, it could have obtained *a stay and judicial review* of the Commission's decision of September 6, 1955 (i.e., Decision No. 51922, Appendix F). But even after it waived this right, there was another way in which the rights of the United States could have been fully protected without the exercise of the drastic injunctive remedy. Common carriers in California, as elsewhere, have a legal duty to accept property and transport it without delay. The United States, through its authorized officers, could at any time demand prompt transportation service from these common carriers. If the District Court had not issued its restraining

order, the minimum rates established by the Commission would have become controlling on December 5, 1955, upon some commercial carriers, and the other carriers would on that date have become bound by their own tariffs. But the United States would have been free to set up in actions at law, by way of defense against the carriers' claims for payment of minimum or tariff charges, the same arguments that it advanced before the District Court, namely, that the United States is not bound to pay minimum or tariff rates established by a State.* Thus, it was possible to avoid any pecuniary damage whatever to the United States, and there would have been nothing for which it would need compensation, by bond or otherwise. On the other hand, California carriers have now forever lost the right to collect minimum or tariff charges for the transportation of property of the Armed Forces since December 5, 1955, a right which they would have had but for the restraining order of the District Court and the action taken by the Commission in compliance therewith.

It is obvious from the foregoing that the equities of the interested parties were unlawfully weighed by the District Court.

The District Court erred further in failing to comply with the principle laid down in a number of cases by the

*At the very time the complaint was filed there was pending in the United States Court of Claims a case in which that Court had decided in the affirmative the very question raised by the complaint, namely, whether a State can lawfully regulate intrastate rates for the transportation of property of the United States. The case is *Hughes Transportation, Inc. v. U. S.* (1954), 121 F. Supp. 212. A motion for further hearing in that case had been allowed when the complaint in the present case was filed.

Supreme Court requiring that Federal Courts abstain from restraining, enjoining or otherwise interfering with action taken by a State in the exercise of its sovereign powers, in order to preserve comity in the relationship between State and Federal Governments. The cases are *Alabama Public Service Comm. v. Southern R. Co.* (1950), 341 U.S. 341; *Public Service Comm. of Utah v. Wycoff Co.* (1952), 344 U.S. 237; and *Public Utilities Comm. of California v. United Air Lines, Inc.* (1953), 346 U.S. 402.

The District Court entertained a complaint that was ill conceived, hastily contrived, and presented by the United States after a capricious change of mind, at the eleventh hour before the effectiveness of Commission action for which the United States had had months to prepare.

The sovereignty of the State of California has been gravely infringed, and the principle of comity between State and Federal Government has been grossly violated by the action of the District Court.

2. The District Court Wrongly Decided the Ultimate Question.

The District Court erred in concluding that the application of Section 530 of the Public Utilities Code, as amended, would "seriously hamper, delay and endanger the United States in the discharge of its constitutional responsibilities of supplying the Armed Services and providing for the common defense." In reaching this conclusion the District Court, we believe, was unduly swayed by the array of military officers who appeared as witnesses for the Government. It was to be expected that these officers (and their civilian assistants) would be zealous in the performance of their duties, and that they would be dis-

posed to feel that any kind of civilian regulation would be burdensome and offensive. These witnesses should not have been allowed to express opinions upon the ultimate question of whether the application of Section 530 of the Public Utilities Code, as amended, would impede and interfere with the exercise by the United States of its constitutional powers to maintain the military establishment and provide for the national defense. When these witnesses said that in their opinions the application of the statute would have that effect, the District Court accepted these opinions uncritically. When carefully analyzed, however, the evidence showed that the only ill effect of the statute upon the United States would be the possibility of increased cost of transportation. The District Court, however, went so far as to rule that such a statute would be unconstitutional and void "in the absence of any act of Congress" (Conclusion of Law No. VII, Appendix A, pp. 69-70). It then further ruled, erroneously appellant submits, that Congress, in Section 22 of the Interstate Commerce Act (Appendix C, pp. 77-78), the Armed Services Procurement Act (41 U.S.C., Section 151(c), Appendix C, p. 78), and the Federal Property [and] Administrative Services Act of 1949, Sections 201 and 202, 63 Stat. 377 (Appendix C, pp. 78, 79), has expressed a general policy that the procurement of transportation for Government property be free of regulation. Both of these rulings conflict with the case of *Penn Dairies, Inc. v. Milk Control Commission*, (1942), 318 U.S. 261. In this case this Court held that the mere fact that the regulation of a person contracting with the Government imposes an increased economic burden on the Government, does not bring the contractor

within any implied immunity of the Government from State regulation. This case also held that there was nothing in the statutes enacted by Congress governing procurement of goods and services by the military and other agencies of the United States, nor in any of the administrative regulations promulgated thereunder, showing any congressional policy that such procurement should be immune from State regulation.

The District Court, in its opinion and conclusions of law, distinguished the *Penn Dairies* case on numerous grounds, none of which, appellant submits, justified the District Court in refusing to follow that case.

Moreover, there was insufficient evidence to support the District Court's finding that there are frequent shipments of property originating or terminating in installations situated on land ceded by the State of California to the United States.

Finally, the District Court's conclusions with respect to the constitutionality of the California statute conflict with the rules laid down by this Court for determining the constitutionality of a statute, viz., the rule that it will be presumed that the officials charged with the execution of a statue will execute it in a manner not offensive to the Federal Constitution, *National Fertilizer Assn. v. Bradley*, 301 U.S. 178; the rule that of two reasonable conclusions, the one favoring constitutionality must be adopted, *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 30; the rule that the Court must assume the existence of any reasonable statement of facts which will sustain the statute, *Alabama State Labor Relations*

Board v. McAdory, 325 U.S. 450, 470, *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185, 486, *Walters v. St. Louis*, 347 U.S. 231, *Gregg v. Frazier*, 253 U.S. 233, 239.

Courts should be slow to strike down legislation of a state "because of its asserted burden upon the Federal Government. For the state is powerless to remove the ill effects of [such] decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies v. Milk Control Commission*, 318 U.S. 261, 275.

In view of the foregoing, Appellant submits that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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(Appendices Follow.)